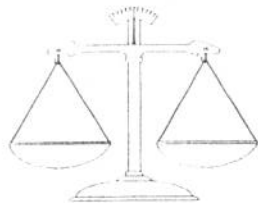


for The Defense



Volume 9, Issue 8 ~ ~ August 1999

The Training Newsletter for the Maricopa County Public Defender's Office ~ Dean Trebesch, Maricopa County Public Defender

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NUTS AND BOLTS OF COMPUTING SENTENCES

By Chuck Krull
Deputy Public Defender - Appeals

Let's face it!. Some of our clients only want to know the answers to three questions. Am I going to prison? How long a prison sentence am I getting? And, finally, when will I be released. Most of us can't answer the first two questions with a great deal of certainty. With a little understanding of how sentences are actually computed, however, it is not difficult to give a client a reasonably accurate estimate of when the first possible release date will be.

The 1994 changes to Arizona's criminal code were intended to inject truth into the sentencing process.

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With these changes came the belief that a client will be released from prison after service of 85 per-cent of the sentence that is imposed. Unfortunately, multiplying the sentence imposed by a multiplier of .85 will not give us the exact date a client will be released from prison. This is because there are numerous factors that influence the manner in which a sentence is computed and there are various types of possible release dates.

Factors Influencing Sentence Computation And Release

Release Credits: A.R.S. sections 41-1604.06 and 41-1406.07 allow most clients sentenced to prison to earn release credits towards the sentence imposed. These credits are awarded at the rate of 1 day for each 6 days served. Hence, the origin of the 85 per-cent rule.

Release credits only begin to accrue to a sentence when a client is placed in a release credit eligible class. This takes place after the inmate has been received by the department of corrections and has completed the classification process.

Pre-Classification Incarceration: Release credits are not earned during any periods of time a client is incarcerated prior to being classified and placed in a release credit eligible class. This includes all periods of presentence incarceration and the period of time from sentencing until completion of the classification process.

Non-Eligible Offenses: Clients who are sentenced to serve the full term of imprisonment by the court are not eligible to earn release credits. This would include the majority of clients sentenced for dangerous crimes against children in the first degree (13-604.01).

Community Supervision: A.R.S. sec. 13-603 I. requires all clients sentenced to prison to serve a term of community supervision consecutively to the actual period of imprisonment. The term of community supervision a client is required to serve is 1 day for every 7 days of the sentence, or sentences, imposed. A client who receives a prison sentence of 7 years must serve an additional term of

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community supervision of 1 year following his release from prison.

If a client receives multiple, concurrent sentences, the term of community supervision is computed based upon the longest sentence imposed.

If a client receives multiple, consecutive sentences, the term of community supervision is computed by adding together the term of community supervision for each sentence and tacking it on to the end of the last sentence.

Community supervision may be waived by the court if a consecutive term of probation is ordered to be served immediately after a client serves a prison sentence. If community supervision is not waived by the court the term of probation begins to run after the client has served the term of community supervision.

Arizona Department of Corrections Types of Release

Temporary Release: (TR) Temporary release is authorized by A.R.S. sec 31-233 B. It is a discretionary release. It may be authorized by the director of the department of corrections within 90 days of a client's earned release credit date (ERCD) to prepare the client to return to the community. For clients who cannot earn release credits because of non-eligible offenses, the TR may be authorized within 90 days of the client's sentence expiration date (SED). Generally, the TR date is the client's first possible release date.

Earned Release Credit Date: (ERCD) Earned release credit release is authorized by A.R.S. sec. 41-1604.07. For a client that is eligible to earn release credits the earned release credit date is the date upon which the release credits earned and actual time served, including

presentence incarceration, equals the sentence imposed by the court. The release credits the client earns, however, do not actually reduce the sentence imposed by the court. Earned release credits merely result in the establishment of a release date that is earlier than the client's sentence expiration date.

Earned release is a mandatory release and release is guaranteed so long as the client signs and agrees to abide by the conditions of community supervision established by the department of corrections for the client's term of community supervision. If the client refuses to sign and agree to abide by the conditions of supervision prior to release to community supervision, then the client will not be released on the ERCD.

An exception to the right to be released to community supervision on the ERCD exists where a client is believed to be a sexually violent person as defined by A.R.S. sec. 13-3701. In that instance release will be delayed until the screening process is complete and the director has determined the client will not be referred to the county attorney pursuant to A.R.S. sec. 13-3702..

Sentence Expiration: (SE) Sentence expiration is the date a client has completed the entire sentence imposed by the court, including presentence incarceration, without the benefit of any release credits earned.

A client who has not been released on the ERCD because of the failure to sign and agree to abide by the terms of community supervision is eligible to be released on the sentence expiration date. Once again, however, the client will be asked to sign and agree to abide by the conditions of community supervision that have been established. Should the client again refuse to do so, the client will not be released on the sentence expiration date and the client will be required to serve the entire term of community supervision in prison.

Community Supervision End Date: (CSED) Community supervision end date is the date upon which the period of statutorily imposed community supervision ends. A client who has not been released on the ERCD or sentence expiration date for failure to sign and agree to abide by the conditions of community supervision will be released from prison on this date.

Practical Illustration

Computing a client's sentence isn't rocket science. It only requires a few, simply mathematical calculations.

Assume Client A receives a presumptive sentence of 3.5 years for a class 3, non-dangerous felony on July 1, 1999 and is taken into custody on that date; he has no presentence incarceration credit; and it takes 30 days for

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Editor: Russ Born

Assistant Editors: Jim Haas
Lisa Kula

Office: 11 West Jefferson, Suite 5
Phoenix, Arizona 85003
(602) 506-8200

for The Defense is the monthly training newsletter published by the Maricopa County Public Defender's Office, Dean Trebesch, Public Defender. *for The Defense* is published for the use of public defenders to convey information to enhance representation of our clients. Any opinions expressed are those of the authors and not necessarily representative of the Maricopa County Public Defender's Office. Articles and training information are welcome and must be submitted to the editor by the 5th of each month.

Client A's dates are not hard to calculate. His temporary release (TR) date is his first possible release date if he is authorized TR by the director. The TR date is calculated by first determining the earned release credit date (ERCD) and subtracting 90 days from that date.

3.5 years X 365 days = total sentence. 1277.5 days
less 30 days to-classify - 30.0
remaining sentence for which release credits can be earned
1247.5 days

total sentence	1277.5 days
less release credits	<u>178.0</u>
equals time client serves prior to release at ERCD	1099.5 days
less 90 days	<u>90.0</u>
equals time client serves prior to TR	1009.5 days

Sentence Expiration Date (3.5 years after July 1, 1999)
December 31, 2002

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If you have specific questions concerning the manner in which a client's sentence is being, or will be computed, you should direct your questions to the Arizona Department of Corrections, Offender Services Bureau, Time Computation Unit at 542-5586

VOLUNTARINESS - A FEW IMPORTANT POINTS AND CASES

A Trial Judge Has a Duty to Exclude an Involuntary Confession Whenever It Appears That the Confession Is Involuntary.

Therefore, no "falling on the sword" is necessary. But defense counsel has an obligation to

inform the trial judge that the judge has a continuing duty to suppress involuntary statements, even if counsel did not previously object. Defense counsel should object at this point and ask that the alleged "involuntary confession" be suppressed.

A Jury Should be Instructed That It Must Find That the Alleged Confession was Voluntary Before Considering It.

If the trial court disagrees and concludes that the confession is voluntary, what is trial counsel's next move?

Defense counsel should ask for an instruction which directs the jury to find that the confession is voluntary prior to considering it. *See State v. Doody*, 187 Ariz. 363, 930 P.2d 440, App. (1996), *cert. denied*, 117 S.Ct. 2456 (1997). The jury is free to disagree with the trial judge and reject the confession. *Id.*; *State v. Gretzler*, 126 Ariz. 60, 84, 612 P.2d 1023, 1047 (1980). Once the trial judge preliminarily determines that the confession is admissible, he must, if requested by defense counsel, instruct the jury to disregard the confession unless it is found by the jury to be voluntary. *State v. Schackart*, 175 Ariz. 494, 858 P.2d 639 (1993). Counsel then is free to re-argue to the jury the same or other points made in support of the confession being involuntary. An omission of such an instruction can be a reversible error. *State v. Amaya-Ruiz*, 166 Ariz. 152, 800 P.2d 1260 (1990).

I recently reviewed a case where defense counsel erred in failing to make this request. A failure to request this instruction may be grounds for an ineffective assistance of counsel allegation in a Rule 32 petition for post-conviction relief.

Confessions are Presumed Involuntary and The State Must Prove Otherwise by A Preponderance of the Evidence.

In Arizona, a confession is presumed to be involuntary and the prosecution has the burden of proving otherwise by a preponderance of the evidence. *State v. Scott*, 177 Ariz. 131, 136, 865 P.2d 792, 797 (1993). Once a defendant has moved for a voluntariness hearing it is the state's burden to prove that the defendant's statements were voluntary. *State v. Alvarado*, 121 Ariz. 485, 591 P.2d 973 (1979).

Improper Influence or Use of Coercive Pressures, Render Statements Involuntary.

"Voluntariness and *Miranda* violations are two separate inquiries." *State v. Rivera*, 152 Ariz. 507, 512, *for The Defense*

733 P.2d 1090, 1095 (1987). A confession is not proven voluntary merely because the police have advised the suspect of his *Miranda* rights. *Id.* at 513, 733 P.2d at 1096.

A confession is involuntary when the police extort it through improper influence or use coercive pressures. *State v. Amaya-Ruiz*, 166 Ariz. 152, 164, 800 P.2d 1260, 1272 (1990). Coercion may be mental as well as physical. A credible threat by the government results in coercion. *Arizona v. Fulminate*, 111 S.Ct. 1246, 1253 (1991).

A statement is involuntary if (1) it was induced by a promise of benefit or leniency, and (2) the defendant relied on that promise in making the statement. *State v. Doody*, 187 Ariz. 363, 370, 930 P.2d 440, 447 (App. 1996), *cert. denied*, 117 S. Ct. 2456 (1997); *State v. Lopez*, 174 Ariz. 131, 138, 847 P.2d 1078, 1085 (1992), *cert. denied*, 510 U.S. 894 (1993). In assessing voluntariness, reviewing courts "look to the totality of the circumstances surrounding the confession and decide whether the will of the defendant has been overborne." *Id.*, at 137, 847 P.2d at 1084 (1992).

Even a slight implied promise will render a confession involuntary. *Brady v. United States*, 90 S. Ct. 1463 (1970).

In *State v. Thomas*, 148 Ariz. 225, 714 P.2d 395 (1986), the court held that the police exerted "improper influence" by telling a child molestation suspect that if he confessed and was found guilty his cooperation would have a beneficial effect on his sentence, but if he did not confess, a lack of a confession would have a detrimental effect on his sentence. The Arizona Supreme Court held that the statement was involuntary.

There is no legitimate purpose for the police to inform a suspect that his failure to cooperate by confessing will be reported to the prosecutor or judge. *United States v. Tingle*, 658 F.2d 1332 (9th Cir. 1981) (footnote 5). Such statements are disapproved as being coercive. *Id.* Under our adversary system of criminal justice, a defendant may not suffer for his silence. *Id.*

In *McLallen v. Wyrick*, 498 F. Supp. 137 (W.D. Mo. 1980), the court held that the prosecutor's statement that the defendant would be better off if he confessed than if he did not confess amounted to a direct or implied promise of leniency. The court found this to be an important consideration in the defendant's decision to make a statement to the prosecuting attorney and the sheriff. The court found that this promise induced the defendant to give a confession which he would otherwise not have given. The court ruled that the confession was unconstitutionally admitted.

Implied promises by the police that no criminal charges would be brought against a suspect have been held to render subsequent statements involuntary. *See State v. Gard*, 358 N.W. 2d 463 (Minn. Ct. App. 1984). A statement that the officer is not going to arrest a suspect or put him "in jail or anything" carries with it the clear implication that he would not be charged if he confessed. *State v. Burr*, 126 Ariz. 338, 615 P.2d 635 (1980). This was held to be an implied promise of a benefit, which rendered the confession involuntary. *Id.*

However, it has been held to be permissible to inform a suspect that his cooperation will be communicated to the proper authorities. In *State v. Hall*, 120 Ariz. 454, 586 P.2d 1266 (1978), the Arizona Supreme Court held it permissible for a detective to promise a suspect that if he confessed his cooperation would be told to the judge and probably have an effect on sentencing.

Conclusion

Police officers want and often need confessions. Look closely at what the officers have told your client. Involuntary or coerced confessions should never be allowed to support a guilty verdict. Thorough pretrial interviews of all of the officers who had contact with your client can be very informative regarding whether the confession is involuntary. ■

THE INDIAN CHILD WELFARE ACT AND MODEL COURT - WILL THE TWAIN EVER MEET?

By Virginia Matté
Deputy Legal Defender - Dependency Unit

Every law school graduate is familiar with the "nutshell series." For the dependency units in the Offices of Public Defender and Legal Defender, as well as Juvenile Court Judicial officers and others interested in esoteric subjects, this is not meant to be a "everything you've always wanted to know about the Indian Child Welfare Act (ICWA) or Model Court but were afraid to ask" article. To adequately cover the many aspects of ICWA alone without any reference to Model Court would take days. This is merely a general overview from this writer's perspective.

The Indian Child Welfare Act found at 25 U.S.C. § 1901 *et. seq.* was enacted in 1978 to protect the
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interests of Indian families and the tribe's interests in their children.¹ The Act does not apply to domestic relations, criminal, or delinquency matters. It applies only to "child custody proceedings" defined as foster care placements, termination of parental rights, preadoptive placement, and adoptive placement. When a tribe intervenes or otherwise participates in these proceedings, it is to protect *tribal* interests and to ensure that the requirements of ICWA are met and not necessarily the individual interests of any other party.

Best Interests of the Child

Everyone who has been involved in the dependency/severance process for more than five minutes knows that the overriding consideration in any child welfare case is the best interest of the child.

However, it is important to all to recognize that the "best interest of the child" referenced in section 1902 of the Act when applied in ICWA cases, is different from that attributed to Anglo-American children. Under ICWA, what is best for an Indian child is presumed to be to maintain ties with his/her Indian tribe, culture and family.²

Jurisdiction

Under the Act, an Indian tribe has exclusive jurisdiction over children who live on the reservation or are wards of the tribal court *even if the child does not live on the reservation*.³ However, when state dependency or severance proceedings regarding a child living off the reservation are filed, the tribe and state court have concurrent⁴ but presumptively tribal⁵ jurisdiction. The Indian tribe is granted the absolute right to intervene in the state court proceedings.⁶ Under certain circumstances, the tribe may move to transfer jurisdiction of the case to the tribe⁷ which *must* be granted, absent the veto of a parent or the tribe or absent "good cause to the contrary."

The Bureau of Indian Affairs Guidelines (BIA Guidelines) found at 44 Fed. Reg. 67,584 help to define and interpret ICWA. The Guidelines do not have the force of law, but all courts consult and follow the Guidelines.⁸ ICWA can be a trap for the unwary and uneducated. If its provisions are not followed, any judicial act can be either void or voidable.

Who Is An Indian Child?

An Indian child as defined by 25 U.S.C. §1903(4) is an unemancipated person under the age of 18 years whose biological or adoptive parent is a *member* of a recognized Indian tribe, and the child is either enrolled or

eligible for enrollment in the tribe.⁹ Note that the Act does not insert "enrolled" in front of "member" when referring to the parent. Indian tribes are the final arbiters of membership,¹⁰ and in some tribes, a person is a "member" of the tribe simply by being born to an Indian parent. Most tribes require an enrollment procedure whereby the individual applies for enrollment and must satisfy tribal requirements for membership, including descendency (being descended from a tribal member) or blood "quantum," or percentage of Indian blood. Tribal requirements for a certain blood "quantum" vary. Note that ICWA applies even if one of the parents is a non-Indian¹¹ if the ICWA requirements are otherwise met. Note further that "Indian parent" does not include an unwed father who has not established or acknowledged paternity.¹²

Once a parent is determined to be a member of a recognized Indian tribe, the next step is to determine if the child is either enrolled or eligible for enrollment. If enrolled, the child will have an enrollment number. To determine eligibility for enrollment, again, the tribe is the final arbiter of this factor. Simply because a parent or Indian custodian may be a member of the tribe does not automatically mean that the child will be eligible for enrollment. The blood quantum requirement again comes into play, and if the child does not have sufficient quantum to satisfy tribal requirements, the child is not eligible for enrollment, and the Act does not apply.

Notice to the Tribe, Parent, or Indian Custodian

Under the Act if a child is even suspected of being an Indian child, the Act applies,¹³ and the tribe and the parent or Indian custodian must receive notice as prescribed by the Act. This means service by registered mail on the tribe, parent, or Indian custodian. An up-to-date list of all recognized Indian bands and their addresses can be found in the March, 1999, edition of the *Federal Register*. Petitioners (usually the Department of Economic Security) in dependency and termination of parental rights cases should realize that many tribes have several offshoots, e.g., Apache, Kiowa Apache, etc. with corresponding addresses. Again, if the correct tribe is not properly noticed, the Petitioner has failed to obtain good service on the tribe. Any Petitioner, case manager, or Assistant Attorney General who does not *actively* investigate possible Indian involvement or who conceals knowledge of Indian involvement does so at their peril.

No foster care placement or severance hearing may be held unless at least ten (10) days' notice is given to the tribe, parent, or Indian custodian, and the tribe, parent, or Indian custodian has an absolute right to an additional twenty days' notice to prepare for the hearing.¹⁴

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What most people overlook is that this notice applies not only to the tribe, but to the Indian parent and/or custodian as well.

Intervention

The tribe has an absolute right to intervene in any child custody proceeding.¹⁵ Court permission is not required. Upon intervening or even upon notification of the proceedings, the tribe has a right to participate, and notice of every hearing, staffing, and even a change of the child's placement from one foster home to another must be given to the tribe.

ICWA can be a trap for the unwary and uneducated. If its provisions are not followed, any judicial act can be either void or voidable.

Burden of Proof in ICWA Dependency and Severance Proceedings

The burden of proof in ICWA cases is higher than under state law. In Arizona non-ICWA dependencies, the burden is by a preponderance of the evidence, while in ICWA dependencies, the burden is clear and convincing.¹⁶ In addition, it must be proved through *qualified* expert testimony that continued custody by the Indian parent would result in serious emotional or physical damage to the child.

In Arizona non-ICWA termination of parental rights cases, the burden of proof is clear and convincing, while in ICWA severances, the burden is beyond a reasonable doubt,¹⁷ with the Petitioner being required to prove through *qualified* expert testimony that continued custody by the parent is likely to result in serious emotional or physical damage to the child.

Active Efforts

Unlike non-ICWA dependencies and severances which require only reasonable/diligent efforts to reunite the family, ICWA requires that the state/Petitioner make *active* efforts to provide remedial services and rehabilitative programs to prevent the breakup of the Indian family.¹⁸ "Active" means exactly what it says: the case manager cannot get away with giving the phone numbers of "ComCare" (or whatever the RHBA happens to be this week), drug rehab, or other facilities to Indian parents and expect that to pass muster as "active efforts," much the same as was held in *Mary Ellen C. v. DES*¹⁹ regarding the attempted termination of the parental rights of the mother on the grounds of mental illness.

Expert Testimony

Finding an expert qualified under ICWA can be problematic. According to (D.4) of the BIA Guidelines, the following characteristics are most likely to meet the criteria: (1) a member of the Indian Child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices; (2) a lay expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe, and (3) a professional person having substantial education and experience in the area of his or her specialty. This expert is required to speak specifically to the issue of whether continued custody by the parents or Indian custodian is likely to result in serious physical or emotional damage to the child.

The Arizona court, as well as other appellate courts, have held that "... special knowledge of Indian life is not necessary where a professional person has substantial education and experience and testifies on matters not implicating cultural bias."²⁰ "Matters implicating cultural bias" involve cultural mores and knowledge of Native American/specific tribal customs as they relate to child care, etc. In *Rachelle S.*, the expert involved was a physician specializing in and testifying concerning shaken baby syndrome. The court found that he was able to answer the ultimate question required by the Act and the Guidelines: whether continued custody by the parent would result in serious emotional or physical damage to the child. Additionally, in *Maricopa County No. JS-8287*, the court found that the tribal social worker qualified as an expert under ICWA. This writer suggests that very few DES case managers have the necessary training and expertise to qualify as ICWA experts. The witness's employment as a DES case manager is not enough: for social workers to be qualified as ICWA expert witnesses, they must possess expertise beyond the normal social worker qualifications.²¹

Placement Preferences

This is another problem area when dealing with Native American children. According to the Act,²² if placement with the parent is not appropriate, a child must be placed in one of the following (listed in order of importance) *absent good cause to the contrary*: (1) a member of the Indian child's extended family; (2) a foster home licensed, approved, or specified by the Indian child's tribe; (3) an Indian foster home licensed or for The Defense

approved by an authorized non-Indian licensing authority; or (4) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the individual child's needs. Section 1915(b) also requires that the child *shall* be placed

in reasonable proximity to the parent's home and should take into account any special needs of the child. One case holds that if the child is placed at a great distance from the parent, this constitutes a de facto termination of the father's parental right of "reasonable

visitation."²³ However, the court can override the requirement of proximity to the parents if the child requires placement at a distant location.²⁴ This writer opines that this approach also applies in non-ICWA cases. The best interests of the child require placement, when possible, in the Indian community and/or in an Indian home²⁵ even if the Indian child has had no previous contact with his/her Indian heritage.²⁶

"Good cause to the contrary" includes three factors found at Section F.3 of the BIA Guidelines: (1) the request of the biological parents or the child when the child is of sufficient age; (2) the extraordinary physical or emotional needs of the child as established by testimony of qualified expert witnesses, or (3) the unavailability of suitable homes that meet the preference criteria. Again, CPS case managers are required to actively seek out Native American relatives, and if none can be found, they must look to Native American placements in other tribes.

With respect to the second requirement, it is important for juvenile court practitioners and judicial officers to recognize that the "extraordinary physical or emotional needs of the child" are for the most part limited to "... highly specialized treatment services that are unavailable in the community where the families who meet the preference criteria live."²⁷ The bonding of the child to his/her non-Indian caregiver or the availability of better schooling have been rejected for the most part.²⁸

Transfer of Jurisdiction from State to Tribal Court

At almost any stage of the proceeding, the tribe may move to transfer jurisdiction from the state court to the tribal court. Pursuant to Section 1911(b) of the Act, in any child custody proceeding involving a child *not domiciled or residing on the reservation*, the state court *shall* transfer jurisdiction to the tribal court absent good cause to the contrary and absent objection by *either* parent or the tribe.²⁹ Note that, under the Act, the objecting parent need not be the Indian parent. This has occurred in Arizona when the child was placed on the reservation with the paternal grandmother, and all but the non-Indian

natural mother believed that the child would be better served by having the case transferred to the tribal court.³⁰

The parent has an *absolute veto* over transfer to the tribal court³¹ – even if the parent happens to be low functioning and has had the assistance of a court appointed guardian ad litem throughout the proceedings.³²

The best interests of the child also may be a consideration in determining whether to transfer a case from state to tribal court. Although all courts do not agree on this issue,³³ it appears that Arizona does apply the usual meaning of “best interests of the child” to transfer proceedings.³⁴

In transfer, as in placement proceedings, the “good cause to the contrary” standard comes into play. Although not defined by the Act, both the Act and the Guidelines are interpreted liberally in favor of deferring to tribal judgment in matters concerning their children.³⁵ According to the BIA Guidelines,³⁶ “good cause” not to transfer exists if the tribe does not have a tribal court. Additionally, “good cause” not to transfer *may* exist if any of the following come into play: (1) the proceeding was at an advanced stage when the petition to transfer was received, and the petitioner did not file the petition promptly after receiving notice of the hearing; (2) the Indian child is over twelve years of age and objects to the transfer; (3) the evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses,³⁷ or (4) the parents of a child over five years of age are not available, and the child has had little or no contact with the child’s tribe or members of the child’s tribe. The Commentary makes clear that “Socio-economic conditions and the perceived adequacy of tribal or Bureau of Indian Affairs social services or judicial systems may not be considered in a determination that good cause exists.” Finally, the burden of establishing good cause lies on the party opposing the transfer.

ICWA and Model Court

The so-called “Model Court” project proceeds under the mandate of the Adoptions and Safe Families Act of 1997 (ASFA) found at 42 U.S.C. § 620 *et. seq.* and 42 U.S.C. §670 *et seq.*, an amendment to Title IV-B and Title IV-E of the Social Security Act. However, as recently mentioned at a Model Court/ICWA seminar,³⁸ there is no such thing as “model court” any more in Arizona. The “model court” concept is up and running.

ASFA was enacted for several reasons, including the concern that the system was too biased in terms of
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keeping children with biological parents regardless of how harmful such environments may be to the children;³⁹ that children were languishing in foster care for sometimes years with no hope of permanency in sight, and to speed up the process from removal of the child from the home to the establishment of a permanent plan for the child within one year of removal. While ASFA’s purposes and goals are well meaning, and in most cases appropriate, exposure to ASFA in Maricopa County thus far has shown that

services mandated to be in place by the preliminary protective conference are in fact not in place. Other problems have also been observed; however, that is for another day.

The parent has an *absolute veto* over transfer to the tribal court...

Because the “model court” concept is rather new, this writer has been unable to uncover any case law regarding the interplay between ASFA and ICWA. Consequently, some of the following observations are taken from the materials and comments of Craig J. Dorsay, Esq., a nationally recognized expert on the Indian Child Welfare Act, who spoke at the Model Court/ICWA conference on July 30, 1999.

When ASFA was considered and enacted, it was enacted without reference to the Indian Child Welfare Act. Accordingly, ASFA does not affect ICWA requirements as they relate to notice, *active* efforts to reunify the family, placement preferences, right of tribal intervention, and transfer to tribal court proceedings; and ultimately, this may cause some degree of consternation among those seeking to meet the time lines and requirements of ASFA in ICWA cases. Likewise, it may cause an even greater degree of consternation when trying to terminate a Native American’s parental rights.

Notice

Under current practice, the preliminary protective conference and preliminary protective hearing is held within five to seven days of the child’s removal from the home. This is insufficient time to provide legal notice to anyone, and obviously, this does not comply with ICWA’s notice requirements. However, the so-called “emergency removal” provision of ICWA seems to provide some support. Under section 1922 of the Act, a child may be removed from the parents on an emergency basis “. . . to prevent imminent physical damage or harm to the child.” Section 1922 goes on to provide that, when that immediate danger is over, the child *must* be returned to his/her parents. According to section B.7 of the BIA Guidelines, this temporary emergency custody shall not be continued for more than 90 days without a determination by the court, supported by clear and convincing evidence and the testimony of at least one qualified expert witness that

custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

Immediate involvement of the tribe is critical, but due to the expedited nature of the new proceedings, tribes are not getting sufficient notice in time to make a meaningful appearance at the preliminary protective conference/hearing, and in most cases, it is impossible for the tribe to appear at this initial proceeding. The information necessary to determine the tribe's interest is not being provided timely, if at all. Every tribe keeps their records differently, and most are not computerized. The Navajo Nation, for example, files enrollment cards by family, and the Nation must know the area of the reservation involved.

To adequately verify whether the parent or child is a member or eligible for membership for ICWA to apply, the minimum information required is the names of the parents and child(ren), dates of birth, census numbers, and the grandparents' names. In addition, the tribe needs the dependency/severance petition, the supporting documentation, and investigative reports.

According to a Navajo Nation representative, the Nation is being told they cannot have this information unless the Nation intervenes. The Navajo Nation is the only tribe who has an Intergovernmental Agreement (IGA) with the State of Arizona as required by ICWA. The IGA requires that the Nation receive this information. Even without an IGA in place, the idea that tribes cannot have the necessary information to allow them to determine if they are involved or should intervene is ludicrous. The necessary information, including the petition and all reports, should be furnished immediately to the tribe.

Aside from the problems presented by the new "model court" procedure, ICWA still requires notice to the tribe, the parent and/or Indian custodian as discussed above with the right to request an additional 20 days to prepare for a hearing. If notice is not properly and promptly given to the tribe, the entire procedure must be done twice.

Active Remedial Efforts *vis a vis* Severance

In this area AFSA and ICWA collide. Under AFSA reasonable remedial efforts are not required under four circumstances: (1) aggravated circumstances, e.g., abandonment, torture, chronic abuse, or sexual abuse of a child; (2) the parent previously had parental rights involuntarily terminated to a sibling to the child currently

for The Defense

in custody; (3) the parent has committed or aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter of the child or another child of the parent, or (4) the parent has committed a felony assault that results in serious bodily injury to the child or another child of the parent. AFSA requires a court order finding one of these circumstances exists before "reasonable efforts" may be terminated. This is *not* the case in ICWA cases.

Since AFSA does not override or supercede ICWA, the requirement of "active remedial efforts" still applies and can be terminated only when DES can meet *ICWA's legal standard* for filing a termination petition. Termination of active efforts may also be appropriate when a permanent out-of-home placement, e.g., guardianship, has been approved.

Immediate involvement of the tribe is critical, but due to the expedited nature of the new proceedings, tribes are not getting sufficient notice in time to make a meaningful appearance at the preliminary protective conference/hearing...

"Active efforts" include assisting the parent with enrolling in drug rehab programs, arranging for counseling, and exploring all services available to the parent – including tribal social services or other services available to Native American parents. Case managers should be told that limiting services to those provided directly by DES is *not*

active efforts, and, as noted above, simply handing the number of ComCare to the parent is *not* active efforts.

Permanency Planning Hearing and Placement Preferences

Under AFSA, a permanency planning hearing is required to be held within one year after the child has entered foster care. At that hearing the so-called "permanent" plan for the child is approved. This plan can be return to/remain with parent, permanent guardianship, or severance and adoption. Under AFSA "long term foster care" does not appear to be an option, although realistically, it is the *only* plan in some cases. Throughout the entire court process, at the permanency planning stage and beyond, ICWA applies and continues to apply until the case is dismissed or the child is adopted.

In any permanency plan which provides for the child to remain out of the home, the ICWA placement references apply and must be followed – absent good cause to the contrary. The placement preferences were listed above. Theoretically (but in practice, not very frequently), the CPS case manager should continue throughout the case to search for appropriate ICWA placements if the child is not already in such a placement. Limiting the search to the child's own Indian extended

family or tribe is not enough: the search must include other Indian tribes both within and without the state.

Placement becomes particularly critical at the severance and adoption stage. If a diligent, active search for an appropriate ICWA placement has not been ongoing with good results, the Indian child may become "bonded" to a non-Indian family who subsequently wants to adopt the child. If absolutely no Indian placements are available, and the case manager can satisfy the court and counsel that active, diligent, ongoing efforts have been made to seek out and place the child with an Indian placement, this could constitute "good cause to the contrary" to avoid the placement preferences. However, if the case manager had not made active, diligent, and ongoing efforts to locate an appropriate ICWA placement, or has ignored an otherwise appropriate placement, the child, the parents, and the tribe are all impacted because "good cause to the contrary" cannot be proven, and the child may be moved to an Indian placement from a foster home where the child has lived for years. While this may seem to be a harsh result, nevertheless, it should be done under ICWA. At least one case has held that even though an Indian child might initially experience emotional pain in being separated from his Caucasian foster family, it did not constitute good cause to defeat the ICWA placement preferences.⁴⁰ *M.T.S.* held that the Indian Child Welfare Act presumed that, in the adoptive placement of Indian children, the child's interests were best served by placement with an extended family member.

The placement preference is not simply legal jargon to be avoided wherever possible simply to get the child placed for adoption and the case closed. An Indian child's heritage, and consequently, his/her placement in a Native American family, has been shown to have far-reaching consequences to the child beyond the closing of the dependency case. When ICWA was first enacted, once expert wrote:

When Goldstein et al. (1973) wrote *Beyond the Best Interests of the Child*, it became a milestone in the application of developmental knowledge on behalf of children in courts being placed in foster homes, given up for adoption, or being placed in the custody of one or another divorced parent: the overriding issue was that time did not stand still for the child and that the courts had to look at

for The Defense

the developmental needs of a child to make attachments to parental figures in their determinations of child placement. The term "psychological parent" came to have special meaning in some courts. The disruption of these longstanding relationships could and did have serious repercussions for the child's subsequent development.

However, the use of these developmental principles involving early childhood needs did not take into account the long-term impact of placement and ignored the special cultural values of some children.

* * *

Thus, a new critical issue emerges. What may be advantageous developmentally for the small child may rob him of his cultural heritage and be devastating to him in his later development.

* * *

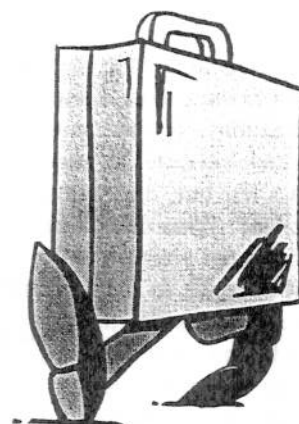
... Judges must learn to recognize that loss of ties with [a child's] tribal customs and culture leaves these children without an identity and can result in an adult life of estrangement from both worlds.⁴¹

What may be advantageous developmentally for the small child may rob him of his cultural heritage and be devastating to him in his later development.

These principles and observations have not changed in 21 years. A 1998 pilot study indicated that "... every Indian child placed in a non-Indian home for either foster care or adoption is placed at great risk of long-term psychological damage as an adult. Nineteen out of 20 Indian adoptees have psychological problems related to their placement in non-Indian homes, and these problems have developed into a syndrome, known as the "Split Feathers Syndrome."⁴²

These concepts, although discussed under "placement preferences" should always be borne in mind when dealing with Indian children. It is clear from the studies that a non-Indian family does not mean that the child will not suffer severe psychological repercussions beginning in his/her adolescence, nor should the case manager conduct a half-hearted search for an appropriate Indian placement, or in the worst case scenario, ignore such a placement to conclude the case rapidly. Likewise,

the court should not rush to avoid the ICWA placement preferences based on the "best interest of the child." ■



1. 25 U.S.C. § 1901 and 1902.
2. *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152 (Tex. 1995).
3. 25 U.S.C. § 1911(a).
4. 25 U.S.C. § 1991 (a) and (b); *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548 (9th Cir. 1991).
5. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989).
6. 25 U.S.C. § 1911(c).
7. 25 U.S.C. § 1911(b).
8. *In the Matter of Maricopa County Juvenile Action No. 8287*, 171 Ariz. 104, 828 P.2d 1245 (1991).
9. *In the Matter of Hunter*, 888 P.2d 1241 (Or. 1995).
10. *In the Matter of Baby Boy Crews*, 803 P.2d 24 (Wa. 1991).
11. *In the Matter of Baby Boy Doe*, 902 P.2d 477 (Idaho 1995).
12. *In the Matter of Maricopa County Juvenile Action No. A-25525*, 136 Ariz. 528, 667 P.2d 228 (1983).
13. 25 U.S.C. § 1912(a).
14. 25 U.S.C. § 1912(a).
15. 25 U.S.C. § 1911(c).
16. 25 U.S.C. § 1912(c).
17. 25 U.S.C. § 1912(f).
18. 25 U.S.C. § 1912(d).
19. 1999 WL 16748 (Ariz.App.Div. 1), decided January 19, 1999.
20. *Rachelle S. v. DES*, 1998 WL 240159 (Ariz.App. Div. 1), decided May 14, 1998; *Matter of Maricopa County Juvenile Action No. JS-8287*, 171 Ariz. 104, 828 P.2d 1245 (1991).
21. *In the Matter of N.L., v. Moore*, 754 P.2d 863 (Okla. 1988), citing *State ex rel. Juvenile Department v. Charles*, 688 P.2d 1354 (Or. 1984)(quoting, House Report for the Indian Child Welfare Act, H.R. 1386, 95 Cong., 2d Sess. 22, Reprinted in 1978 U.S.Code Cong. And Admin.News 7530, 7545).
22. 25 U.S.C. § 1915(b).
23. *D.H. v. State of Alaska*, 723 P.2d 1274 (1986).
24. *State ex rel. Juv. Dept. v. Charles*, 810 P.2d 393 (1991).
25. *Maricopa County Juvenile Action No. S-903*, 130 Ariz. 202, 635 P.2d 187 (1981).
26. *In re Junious M.*, 193 Cal. Rptr. 40, 144 Cal App 3d 786 (1983).
27. BIA Guidelines, §F.3, Commentary.
28. *Matter of S.E.G.*, 521 NW2d 357 (Minn. 1994).
29. See also *Mississippi Band of Choctaw Indians v. Holyfield*, *supra*.
30. *In the Matter of the Appeal of Maricopa County Juvenile Action No. JD-6982*, 186 Ariz. 354, 922 P.2d 319 (1996).
31. *Id.*
32. *Id.*
33. *Yavapai-Apache Tribe v. Mejia*, *supra*.
34. *In the Matter of the Appeal in Maricopa County Juvenile Action No. 8287*, *supra*.
35. BIA Guidelines, §A.
36. Section C.3 Commentary.
37. *In the Matter of the Appeal in Maricopa County Juvenile Action No. 8287*, *supra*, holding that the court may apply a modified version of *forum non conveniens* in transfer proceedings.
38. AFSA and ICWA, June 30, 1999.
39. Statements of various congresspersons found generally at 143 Cong.Rec.
40. *In re the Adoption of M.T.S.*, 489 N.W.2d 285 (Minn. 1992); *contra*, *In the Matter of Baby Boy Doe*, 902 P.2d 477 (Idaho, 1995).
41. Berlin, Irving N., M.D. *Anglo Adoptions of Native Americans: Repercussions in Adolescence*. 1978 *American Academy of Child Psychiatry*.
42. Locust, Carol, Ph.D. *Split Feathers: Adult American Indians who were placed in non-Indian families as children*. *Pathways*, Vol. 13, No. 4, September/October 1998.

CAN YOU DUMP ONTO CLIENTS AS THEY HAVE DUMPED ONTO YOU?

By Jeremy D. Mussman
Trial Group Supervisor - Group E and
Derron Woodfork
Law Clerk - Group E

Being a deputy public defender certainly has its ups and downs. A surefire way of getting your morning off to a lousy start is getting dumped on by a client during morning calendar. Most of us have been there -- you go over to court for your 8:30 hearing. Your client is in custody. You've met with him a number of times. He wants the case to go away and is convinced that you're working for the prosecutor. You've spent a lot of time with him, both during jail visits and telephone conversations, trying to explain the ins and outs of his case, including the pros and cons of his plea agreement. He glares at you most of the time, but, eventually, he appears to understand the gravity of the situation, and is coming to grips with the need to listen to your advice. That is, until you're standing in open court arguing a routine motion on his behalf in front of all of your colleagues. That's when he chooses to tell the judge that you only visited him once and during that visit told him that he was guilty and you didn't plan on doing any work for him. In addition, if the defendant was planning ahead, you'll find out from the judge that the defendant also filed a pro per motion for new counsel in which he details all of the sins he maintains you have committed against him.

Of course, you know that everything the defendant is alleging is false -- you've visited him in person in the jail numerous times, taken half a dozen phone calls from him, delivered information to him via jail mail, and diligently worked on his case. So, what do you do when the judge

turns to you and says, "Defense counsel, do you wish to respond?" The first thing to do is probably the most difficult -- to remember that you are there to zealously represent your client. Your client, on the other hand, has no such obligation. In fact, you are probably the only "dog he can kick" in order to vent his frustrations. We're not saying it's fair but, then again, *you are* the attorney. *He is* your client. Even though he might be acting like it at the time, he is not your adversary. In fact, chances are that you will continue to represent this client and he will continue to appear before this judge. In addition, it's likely that this is the judge who will be sentencing him, with you standing by his side. Consequently, the far sighted approach to this situation would be to avoid "dumping on your client as he has dumped onto you." That means, even though it's tempting, you don't whip out your caselog and start listing the numerous times that you visited him in the jail. You don't prove to the judge that your client is lying. Rather, as discussed below, case law, ethics opinions, and the rules of ethics indicate that you are limited to making a "proportionate and restrained response" to the extent that any response is even necessary.

Arizona Ethics Rule 1.6 restrains a lawyer's response to a clients disparaging statements. The rule states, in part:

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (d) or ER 3.3(a)(2).

Part (d), in turn, states:

A lawyer may reveal such information to the extent the lawyer reasonably believes necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceedings concerning the lawyer's representation of the client.

In a situation where the client is disparaging the lawyer in open court, it could be argued that subsection *for The Defense*

...the rules of ethics indicate that you are limited to making a "proportionate and restrained response" to the extent that any response is even necessary.

(d) would allow a lawyer to respond to the defendant's allegations by revealing confidential information under the language "... or to respond to allegations in any proceedings concerning the lawyer's representation of the client." A.R.S. Sup. Ct. Rule, E.R. 1.6. However the commentary after the rule limits the exception to very narrow circumstances, stating that the typical application of subsection (d) is when there is a formal charge by a third party that the lawyer is an accomplice in a crime in which the lawyer's client is involved. The comment gives the example of a situation in which a person has claimed that the lawyer and the lawyer's client working together have defrauded a third person. In our situation, the client has not made a formal charge; he has simply told the judge that he is unhappy with his court appointed lawyer.

Given the limitation of 1.6(d) by the comment, how should the lawyer respond in our example? Ethics committee opinions suggest that a lawyer may respond to informal allegations of misconduct by revealing confidential information. In Arizona Bar Opinion 93-02 the committee points out that Section 116 of Tentative Drafts Nos. 2 and 3 of the proposed Restatement of the Law Third, The Law Governing Lawyers, state:

A lawyer may use or disclose confidential client information to the extent that the lawyer reasonably believes necessary in order to defend the lawyer against a charge by any person that the lawyer or a person for whose conduct the lawyer is responsible acted wrongfully during the course of representing a client.

Az. Op. 93-02 (March 17, 1993) at page 4.

Comment (f) to section 116 reads, in part:

Normally, it is sound professional practice for a lawyer not to use or reveal confidential client information except in response to a formal client charge of wrongdoing with a tribunal or similar agency. When, however, a client has made public charges of wrongdoing, a lawyer is warranted under this Section in making a *proportionate and restrained response* in order to protect the reputation of the lawyer.

Az. Op. 93-02 (March 17, 1993) at page 5. (emphasis added) In our situation, the client is making a public
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charge of wrongdoing -- he is in open court claiming that the lawyer is doing nothing to help his case. Hence, under tentative section 116, the lawyer can respond to the allegations in a manner that is *reasonably necessary* to defend himself against the allegations. Any such response, however, must be proportionate and restrained. The opinion states, "*We emphasize that our conclusion should not imply that an attorney may simply open his or her file in response to any such derogatory allegations.*" *Id.*, at page 5. (emphasis added).

So, what is a "reasonably necessary proportionate and restrained response"? Obviously, that's subject to a number of different interpretations. The bottom line is that you and your client have very little to gain from you "dumping" back on him after he has dumped upon you. In this type of situation, the safest and most professional practice is to say nothing and, if asked, tell the judge the information is privileged, thereby letting the judge determine the appropriate course of action. By giving this response, the lawyer has upheld the duty to represent the client's interests.

In Arizona Bar Opinion 95-02, while discussing a lawyer's right to divulge non-confidential information, the committee stated, "But if other information is protected by the duty of confidentiality, counsel will have to tell the court that any additional information is privileged and let the court make further inquiry or rulings as the court deems appropriate." Az. Op. 95-02 (Feb. 1, 1995) at page 5. Under the adversary system, a lawyer is to act as a zealous advocate to uphold the client's rights. Az. Op. 98-01 (Jan. 1998) at page 5. With this in mind, the ethical obligation of a lawyer to hold inviolate confidential information of the client facilitates the full development of facts essential to zealous representation of the client. E.R. 1.6., *Comment*. Consequently, confidentiality facilitates full and frank discussions of all information the client may have. E.R. 1.6., *Comment*.

If, on the other hand, the lawyer chooses to divulge confidential information to rebut the client's allegations, the lawyer is no longer working as an advocate for the client. The court dealt with this issue in *U.S. v. Gonzalez*, 113 F.3d 1026, 1029 (9th Cir. 1997), stating that when the court invited the lawyer to contradict his client and to undermine his veracity, the client was left to "fend for himself, without representation by counsel..."

In conclusion, the best way to avoid these situations is through client centered representation of clients -- do the jail visits, take their phone calls, and show them, through your actual work product, that you are working on their
for The Defense

The bottom line is that you and your client have very little to gain from you "dumping" back on him after he has

behalf. If, despite doing all of this, a client still pulls this kind of stunt on you in open court and directly disparages your professional reputation through false allegations, *do not* respond in like kind. Do not demonstrate to the court that your client is a liar in an effort to protect your reputation. To do so would, in actuality, be shooting yourself in the foot. Disclosing confidential information and informing the court that your client is a liar harms, rather than helps, your reputation. If you have proven yourself to be

a competent, hard-working defense attorney, then the court should put the allegations in the proper context. If the court insists on a response, a non-defensive restrained and proportionate response should be given, with an effort to avoid disclosing any confidential information regarding the attorney/client relationship and to minimize the damage to your client. ■

ARIZONA ADVANCE REPORTS

By Steve Collins
Deputy Public Defender - Appeals

In re Anthony H., 297 Ariz. Adv. Rep. 59 (CA 1, 7/1/99)

The juvenile was adjudicated delinquent under A.R.S. Section 13-3111 for being a minor in possession of a firearm. This statute only applies in counties with a population of more than 500,000. It was proper to take judicial notice of the population of Maricopa County. It was improper to impeach the juvenile with a prior juvenile adjudication.

Bazzanella v. Tucson City Court, 298 Ariz. Adv. Rep. 45 (CA 2, 6/16/99)

Bazzanella was convicted of misdemeanor child abuse which only requires no more than criminal negligence. It was not a crime involving moral turpitude nor were there grave consequences attached to the crime. Therefore, Bazzanella was not entitled to a jury trial.

State v. Brown, 298 Ariz. Adv. Rep. 28 (CA 1, 6/22/99)

Brown was convicted of DUI on a suspended driver's license. He was not entitled to an instruction on driving on a suspended license as a lesser included offense because it requires proof of actual driving and that the offense occurred on a public highway. The aggravated DUI offense does not require these elements.

State v. Clabourne, 298 Ariz. Adv. Rep. 12 (SC, 6/18/99)

Clabourne was sentenced to death. At the presentence hearing, two experts testified he suffered from mental illness, probably schizophrenia. The Arizona Supreme Court rejected the contention that having a mental illness was necessarily a mitigating factor.

State v. Cohen, 298 Ariz. Adv. Rep. 18 (CA 1, 6/25/99)

Cohen was convicted of commercial bribery. Evidence that he paid kickbacks satisfied the element of economic loss required under A.R.S. Section 13-2605. Cohen was also convicted of fraudulent schemes and artifices under A.R.S. Section 13-2310. It was reversible error for the trial judge to instruct the jury that reliance by the victim was not an element of the crime.

State v. Kayer, 298 Ariz. Adv. Rep. 3 (SC, 6/29/99)

Kayer was sentenced to death. His previous conviction for burglary in the first degree was found to be an aggravating factor as it was a "serious offense" under A.R.S. Section 13-703(F)(2).

State v. Murray, 298 Ariz. Adv. Rep. 24 (SC, 6/18/99)

In 1989, Murray was sentenced to a flat sentence of 21 years imprisonment for sexual assault. In 1996, in *State v. Tarango*, the Arizona Supreme Court found the sentence was not a flat sentence and Murray was eligible for parole after two-thirds of the sentence is served.

In response to *Tarango*, the Arizona legislature passed a law in 1997 that all sexual assault charges would be served as flat time and that the statute would apply retroactively. The Arizona Supreme Court held the new statute could not apply to Murray as otherwise it would be a violation of the separation of powers doctrine.

State v. Valenzuela, 298 Ariz. Adv. Rep. 26 (SC, 6/18/99)

Valenzuela and Jose Vasquez had a continuing feud. While drinking, Jose taunted Valenzuela, daring him to shoot Jose. According to Valenzuela, he shot at Jose to only wound him and stop his "yapping." He shot Jose once and as he went to fire a second time, Patricia Fernando stepped between him and Jose. Patricia was killed by the shot.

Valenzuela was charged with first degree murder. He was entitled to instructions on the lesser included offenses of second degree murder and reckless manslaughter. The trial judge inadvertently failed to give the instruction on manslaughter and defense counsel failed to correct the

for The Defense

mistake. Valenzuela was convicted of second degree murder.

Even though the evidence supported a conviction for second degree murder, failure to give the manslaughter instruction "removed from the jury the 'option of convicting on a . . . less drastic alternative.'" This deprived Valenzuela of the "full benefit of the reasonable doubt standard."

The Arizona Supreme Court could not conclude beyond a reasonable doubt that the error did not contribute to the verdict despite the fact the "evidence supporting a reckless manslaughter rather than a second degree murder conviction was not strong." The case was reversed because it was fundamental error.

In re Richard M., 299 Ariz. Adv. Rep. 57 (CA 1, 7/15/99)

The juvenile was placed on probation. As a written term of probation, he was required to allow drug testing and treatment. At the probation revocation hearing, the probation officer testified she orally advised the juvenile to report to TASC for testing but that she did not reduce this instruction to writing. It was reversible error to revoke probation because of the juvenile's failure to report to TASC. Probation may not be revoked for violating an unwritten term of probation.

State of Arizona v. Galati, 299 Ariz. Adv. Rep. 37 (SC, 7/8/99)

The question was presented whether a "trial judge can order a bifurcated trial that permits a defendant to plead guilty or to stipulate to prior convictions that are elements of a charged offense and withhold knowledge of the defendant's plea or stipulation from the jury and submit the remaining elements to the jury." The Arizona Supreme Court held that Aggravated DUI defendants are not entitled to a bifurcated trial to prevent jurors from hearing about prior DUIs because the priors are elements of the crime and must be proved beyond a reasonable doubt to a jury. ■

BULLETIN BOARD

New Attorneys

Frank Johnson, returns to the office on September 7 after two years at the County Attorney's Office. Frank will return to our Durango Juvenile office, where he worked for two years, until 1997.

Rick Kreckler, assumed a new office role as a temporary status weekend attorney for our juvenile court operations,

effective August 7. Several years ago Rick worked as a trial attorney with this office.

New Support Staff

Two new legal secretaries have joined Group C.
Debra Colvin joined the office on August 2.
Martha Rodriguez started on August 23.

Elizabeth McGee, Trainee, began working in Records on August 2 in a short-term capacity.

Matt Elm, Trainee, returned to the office on August 9 for a special assignment.

Support Staff Moves/Changes

Tracy Randolph left the office on August 13 to attend law school. She was a legal secretary for Group C.

Cecilia Ulibarri, Secretary in Dependency, left the office on August 11.

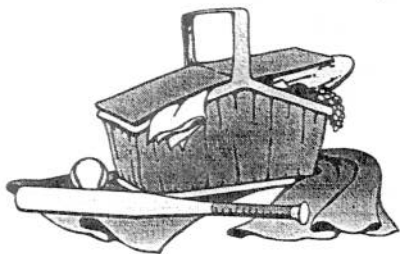
Elaine Sandoval, Trainee in Group E, left the office on August 20.

Dan Ridley, will be leaving the office on September 3 to work at Wells Fargo Bank. Dan has been the Operations Manager for the office since July of 1998.

Andrew Swierski, transferred to the Pretrial Services Division of Superior Court on August 23 from our Initial Services Unit.

Patricia Williams, Secretary first in Group D and then Appeals, left the office on August 17. ■

Happy Labor Day!



Mark Your Calendar!



Friday, October 22, 1999

Radical Advocacy: A Journey and a Joining

Presenters: Sunwolf &
Storyteller - Jim May

A Powerful, Participatory
Workshop in Storytelling Skills.



- ◆ Changing the *Lecture* of Openings and Closings into *Conversation*
- ◆ Gaining Jury Connection from the First Moment You Speak
- ◆ Multicultural Communication: Appealing to different value systems

July 1999 Jury and Bench Trials

Group A

Dates: Start-Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR # and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
6/14-6/17	Farrell Yarbrough	Akers	Frick	CR 98-17175 Armed Robbery/ F2D Kidnapping/F2D Theft/F3	Not Guilty	Jury
7/6-7/6	Pettycrew	Pershall	Beresky	MCR 99-00505 IJP/M1	Not Guilty	Bench
7/6-7/8	Green	O'Toole	Gadow	CR 98-04898 Agg. Assault/F3D Drive-By Shooting/F2D	Directed Verdict	Bench
7/12-7/15	Parsons Clesceri	Galati	Greer	CR 99-01880 Agg. Assault/F3D Agg. Assault/ F3D Agg. Assault/F2DCAC	Hung Jury on 1 ct. Agg. Assault; Guilty of Agg. Assault; Not Guilty of Agg. Assault/F2DCAC; Not Guilty of lesser included Agg. Assault/F6 with 6 priors	Jury
7/20-7/20	Flores	Fletcher	Mauger	TR 99-00005 DUI/M1	Guilty	Jury
7/27-7/27	Lehner & Knowles Yarbrough & Clesceri	McVey	Godbehere	CR 99-02252 PODDFor Sale/F2 PODP/F6	After jury selection State amended to simple PODD and PODP, submission on DRs	Jury

Group B

Dates: Start/Finish	Atty/Invest/ LitAsst/Sec	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
7/8-7/9	LeMoine Erb	Schneider	Leigh	99-0400 Sale of Narcotic Drug/F2 ND	Not Guilty	Jury
7/12-7/13	Whelihan Munoz	Hutt	Kerchansy	CR98-17284 Aggravated Assault/F5	Guilty	Jury
7/13-7/15	Blieden	O'Toole	Davidon	CR98-15206 Aggravated Assault/F3D	Not Guilty of Agg. Assault Guilty of Disorderly Conduct/F6ND	Jury
7/15-7/19	Lemoine Erb	Wilkinson	Novak	99-05126 Aggravated Assault/F5	Guilty	Jury
7/19-7/21	Ochs & Bublik Munoz	Hutt	Lamm	98-06156 Forgery/F4, Possession of Forgery Device/F5	Not Guilty	Jury

Dates: Start/Finish	Atty/Invest/ LitAsst/Sec	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
7/19-7/22	Whelihan	O'Toole	Freeman	CR98-11390 2 Cts. Sex Conduct w/minor/F2DAC, Sex Abuse/F2, Aggravated Assault/F2, Kidnap/F2, Using Minor for Marij. Marij. In a School Zone	Guilty	Jury
7/26-8/2	Grant	Hall	Davidon	CR 98-14898 Aggravated Assault/F3	Guilty	Jury
7/27-7/28	Gray	O'Toole	Spencer	CR 97-01005(B) Att.POND/F5	Guilty	Jury
7/28-8/2	Liles	D'Angelo	Leigh McBee	CR 99-03836 Forgery/F4	Not Guilty	Jury

Group C

Dates: Start-Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR # and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
6/28/99 to 7/1/99	Levenson & M. Rossi Beatty Turner	Aceto	Aubuchon	CR98-95409 2 Cts. Sexual Conduct W/Minor, F2-DCAC	Ct. 1, not guilty Ct. 2, dismissed day of trial	Jury
7/1/99	Levenson	Keppel	Arnwine	CR99-90622 1 Ct. Forgery, F4	Directed Verdict Not Guilty	Bench
7/2/99 to 7/9/99	Vaca	J. Norman Hall	J. Evans	CR92-91118 Ct. 1, Child Molest, F2-DCAC Ct. 2, Sexual Abuse, F3-DCAC Ct. 3, Sexual Conduct W/Minor, F2-DCAC Ct. 4, Child Molest, F2-DCAC Ct. 5, Sexual Abuse Under 15, F3-DCAC Ct. 6, Sexual Conduct W/Minor, F6N Ct. 7, Sexual Conduct W/Minor, F6N Ct. 8, Sexual Abuse, F5N	Ct. 1 - Guilty Ct. 2 - Guilty Ct. 3 - Hung Jury Ct. 4 - Hung Jury Ct. 5 - Hung Jury Ct. 6 - Guilty Ct. 7 - Guilty Ct. 8 - Not Guilty	Jury
7/6/99 to 7/9/99	Schmich & Stein Thomas	Jarrett	Click	CR98-92290 4 Cts. Indecent Exposure, F6N	3 Cts. Guilty 1 Ct. Not Guilty	Jury
7/9/99	DuBiel	Hamblen	M. Anderson	CR98-3331-M1 Ct. 1, Assault, M1 Ct. 2, Disorderly Conduct, M1	Ct. 1 - Not Guilty Ct. 2 - Guilty	Bench
7/15/99 to 7/19/99	Nermyr & Jolley	Jarrett	Contreras	CR99-90931 1 Ct. PODD, F4 1 Ct. POM, F6	Guilty	Jury
7/20/99 to 7/21/99	Walker & S. Silva	Jarrett	Holtry	CR99-90330 2 Cts. Agg DUI, F4N	Guilty	Jury
7/15/99 to 7/22/99	Murphy Thomas	Keppel	Bennink	CR99-90291 1 Ct. Theft, F3	Not Guilty	Jury
7/26/99 to 7/28/99	Ramos Breen	Keppel	Fladder	CR99-91156 1 Ct. Theft with 2 priors, F3	Not Guilty	Jury

7/28/99 to 7/30/99	Barnes Breen	Schneider	Brenneman	CR98-95382 1 Ct. Drive-By Shooting, F2D 1 Ct. Agg Assault, F3D	Guilty - both counts	Jury
7/27/99 - 7/28/99	M. Rossi & Klopp-Bryant	Ballinger	Park	CR99-91166 1 Ct. Possession of Meth, F4	Guilty	Jury
7/20/99 to 7/29/99	Ronan Rivera & Bradley	Gerst	Armijo	CR98-05869 Ct. 1, Murder, F1D Ct. 2, Burg 1st Degree, F2D Ct. 3, Armed Robbery, F2D Ct. 4, Possess Prohibited Weapon, F5N	Ct. 1 - Guilty Ct. 2 - Guilty Ct. 3 - Not Guilty Ct. 4 - Guilty	Jury

Group D

Dates: Start-Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR # and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
7/1 - 7/1	Ferragut	Katz	Farnum	CR 98-17108 1 Ct. Theft, F2	Dismissed by Judge	Jury
7/12 - 7/12	Dwyer	D'Angelo	Farnum	CR 99-01199 1 Ct. Theft, F3	Dismissed by Judge	Jury
7/12 - 7/12	Schreck Barwick Woodfork	Hall	Myers	CR 99-00593 1 Ct. Disorderly Dang., F6	Dismissed w/Prejudice During jury selection	
6/14 - 6/14	Ferragut	Gerst	Clarke	CR 99-05002 Ct. 1 Agg Asslt, F6 Ct. 2 Resist Officer/Arrest, F6 Ct. 3 Crim. Trespass Ct. 4 Crim. Trespass Ct. 5 Agg. Crim. Damage	Ct. 1 - Not Guilty Ct. 2 - Guilty Ct. 3 - Dismissed Ct. 4 - Dismissed Ct. 5 - Dismissed	Jury
7/7/99- 7/14/99	Billar & Ferragut	D'Angelo	Levy	CR 98-13805 1 Ct. Murder 1, F1; 1 Ct. Burglary 1, F2; 1 Ct. Agg. Asslt., F3	Not Guilty of 1° Guilty of Second Degree Murder; Not Guilty of Armed Robbery; Guilty of Agg. Assault, Dangerous	Jury
7/15-7/16	Billar	Gottsfield	Cottor	CR 98-01664 1 Ct. Sell Crack Cocaine, F2	Guilty	Jury
7/13-7/14	Harris & Wilson	Dougherty	Adleman	CR 99-03351 1 Ct. Burglary, F3	Guilty	Jury
7/19-7/19	Zelms	Dougherty	Johnson	CR 99-03959 1 Ct. Sex Abuse, F4	Dismissed	
7/21 -7/27	Enos Castro	Dougherty	Kerchansky	CR 99-01755 1 Ct. Armed Robbery Dangerous, F2	Guilty	Jury

7/14 - 7/20	Kibler	Bolton	Mitchell	CR 99-00138 Ct. 1: Sex Abuse under 15, F3N; Ct. 2: Child Molesting, F2N; Ct. 3 Sexual Conduct w/Minor, F2N; Ct. 4: Child Molesting, F2N; Ct. 5: Sex Abuse Under 15, F3N; Ct. 6: Attp/Com Sexual Cndct w/Minor, F2N; Ct. 7: Sexual Conduct w/Minor, F2N; Ct. 8: Sexual Conduct w/Minor, F2N; Ct. 9: Sexual Conduct w/Minor, F2N	Directed Verdict on Counts 1 and 9; Count 5: Not Guilty Counts 2-3-4-6-7-8: Guilty	Jury
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Group E

Dates: Start/Finish	Atty/Invest/Lit Asst/Sec	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
7/13-7/21	Bond	Oberbillig	Astrowsky	CR 98-10940 10 Cts. Sex. Cndt. W/Minor/F2 DCAC 5 Cts. Furnishing Harmful or Obscene Materials to Minors/F4 Child Molest/F2 DCAC Att. Sex. Cndt. W/Minor/F3 DCAC	4 Cts. Sex. Cndt. w/Minor dismissed by State at close of State's case 3 Cts. Furnishing Harmful or Obscene Materials to Minors dismissed by State at close of State's case 1 Ct. Att. Sex. Cndt w/Minor dismissed by State at close of State's case All others guilty	Jury
7/14	Roskosz	Hutt	Lamm	CR 99-03046 Asslt. w/ Bodily Fluids/F6	Not guilty	Jury
7/20-7/21	Ryan Brazinskas	Akers	Rodrigues	CR 98-17176 Burg./F3 Poss. Of Burg. Tools/F6	Guilty on both counts	Jury
7/26-7/27	Porteous	Reinstein	Fuller	CR 99-06009B Burg./F3 Theft/F4 w/2 priors	Hung Jury (6-6)	Jury

DUI Unit

Dates: Start-Finish	Attorney Investigator Litigation Assistant	Judge	Prosecutor	CR # and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
7/6- 7/8	Timmer	P. Reinstein	J. Smith	CR99-02680 1 Ct. Agg DUI, F4	Guilty	Jury
7/19- 7/21	Timmer	Baca	Poster	CR99-05618 1 Ct. Agg Assault, F2 2 Cts. Agg DUI, F4 1 Ct. Unlawful Flight, F5	Not Guilty - Agg Assault Guilty - 2 Cts. Agg DUI and 1 Ct. Unlawful Flight	Jury



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